No. 10389

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONSOLIDATED AIRCRAFT CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Brief of Consolidated Aircraft Corporation Petitioner.

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BRIEF FOR PETITIONER.

Jurisdiction.

This case is before the Court upon petition of Consolidated Aircraft Corporation for review of and to modify or set aside an order of the National Labor Relations Board issued against the petitioner (hereinafter sometimes called the "Company") requiring it to cease and desist from in any manner interfering with, restraining or coercing its employees in the exercise of the right of self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

The petition was filed pursuant to Section 10(f) of the National Labor Relations Act (49 Stat. 449, U. S. Code, Title 29, Sections 151-166).

The National Labor Relations Board, in its answer petitioned for the enforcement of its order pursuant to Section 10(c) of the Act.

The Company is a Delaware corporation having its principal place of business in San Diego, California, where the alleged unfair labor practices occurred.

Order [Transcript of Record p. 89];*
Petition [Transcript of Record p. 122];
Answer [Transcript of Record p. 130].

Statement of the Case.

The proceedings before the Board were instituted by a second amended charge filed on July 17, 1942 by National Association of Machinists, Aircraft Lodge No. 1125, A. F. L. (hereinafter called the "Union"), whereupon the Regional Director for the 21st Region (Los Angeles) issued a complaint [Board's Ex. 1-B, 4] dated July 23, 1942, alleging that the Company had engaged in and was engaging in unfair labor practices within the meaning of Sections 8(1), (3), and (5) and Sections 2(6) and (7) of the National Labor Relations Act. The Company answered denying such charge [16].

The Company admits that it is engaged in commerce [Stipulation, 143].

The Company has its main office and plant at San Diego, California, and is engaged in the design, development, manufacture and sale of aircraft, aircraft parts and accessories. It is one of the largest manufacturers

*All references hereafter are to numbered pages of the Transcript of Record.

of flying boats in the United States, one of the largest contractors with the United States Army and Navy for aircraft, and its San Diego plant is the second or third largest airplane manufacturing establishment in the United States [Stipulation, 143].

It has two plants at San Diego, one called Plant One, or the Home Plant, consisting of a number of buildings, in which it manufactures bombers for the United States Army and flying boats for the United States Navy, and Plant Two or the Parts Plant, separated at a distance of approximately one-half mile. The latter plant was erected by the Defense Plant Corporation for the Company at a cost of approximately $22,000,000. This latter plant is devoted entirely to the manufacture of parts for airplanes and airplane accessories and consists of four or five various buildings.

Army and Navy regulations do not permit the Company to state the exact number of its employees. There are nearly one hundred different departments in the Company's operations. It employs 47 general foremen, 6 assistant general foremen, 149 foremen and 247 assistant foremen [252]. According to the provisions of the contract with the Union, hereinafter referred to, the Union has in the Company's plants 270 union shop committeemen and 125 union stewards [Phillips, 226]. From these figures the magnitude of the Company's operations may be inferred. Its extremely rapid growth in the last two years was conceded [250].

Pursuant to various proceedings before the Board (2 N. L. R. B. 772; 7 N. L. R. B. 1061; 8 N. L. R. B. 205) the Company entered into an agreement in 1939 with Aircraft Lodge No. 1125 of the International Association

of Machinists, A. F. L., recognizing it as the collective bargaining representative for all hourly paid employees. The original agreement is not in the record and is not material.

Upon its expiration, pursuant to negotiations which lasted a number of weeks, the Company and the Union entered into a successor agreement on June 12, 1941 [Board's Ex. 3, 146], which is to endure for two years, or for the period of the unlimited National Emergency proclaimed by the President on May 27, 1941, whichever is the longer.

Some of the most important provisions of the collective bargaining agreement are:

1. The Union is recognized as the bargaining agency for all hourly paid employees and salaried inspectors [148].

2. The Company agrees to recommend to its employees that they join the Union, and to check-off dues of union members [148].

3. The Union agrees that there will be no solicitation of employees for union membership on Company time [148].

4. Rates of pay for beginners are fixed and wages of leadmen and supervisors are fixed in excess of ordinary employees [149].

5. A joint committee shall review the wage rates of each individual upon completion of each individual's six months period of continuous employment with the Company, and appeal to a higher committee and arbitration are provided for in the event of disagreement. Interim merit increases may be granted provided the foreman and

the union committeemen are consulted prior to the granting of such increases [149-150].

6. The work week is defined and provisions made for overtime and double time as provided therein [151-152].

7. By amendment of March 5, 1942, an elaborate procedure with reference to complaints and grievances is provided for [152-154].

8. The Union recognizes that the regulations in the Company's rule book are necessary for the efficient operation of the plant and that infraction of rules will constitute cause of discharge or disciplinary action [154].

9. The Company agrees not to intimidate nor in any way discriminate against any employee because of union activities, and the Union agrees not to intimidate nor in any way discriminate against any employee not belonging to the Union [154].

10. Arbitration is provided for of all matters in dispute by appointment of two members each from the Company and the Union, and the selection of an arbitrator by the Defense Mediation Board [158].

11. The Union agrees that there will be no strike or slow down while matters are being considered in arbitration [158].

The Company's labor relations in the past are wholly barren of any such unfair labor practices or disputes between it and its employees, as brought about the enactment of the National Labor Relations Act. It is well settled that the issues in this case should be considered and weighed in the light of the general background of such relations. This record does not show any past strikes, industrial strife, labor espionage, anti-union propaganda,

discrimination against union members, refusal to bargain collectively or other labor difficulties.

The Union filed a charge that the Company had discharged two employees named Fisher and Williamson in January and April, 1942 because of union activity and had refused to re-employ them in violation of Section 8(3) of the Act.

It further charged that although the Union had been duly designated the bargaining agent of the Company, that the Company had (a) given raises to 286 employees without consultation with the Union; (b) given additional raises to other employees who have not made known in writing such increases to the Union; (c) that it proposed to discuss further wage increases for eligible employees, many of the employees being the same employees for whom the Union was preparing increased demands; (d) that in 22 specific instances the Company had made individual wage agreements with employees, and that prior to February 15, 1942 the Company adopted a wage scale in cooperation with other manufacturers and refused to negotiate with reference thereto; (e) that it arbitrarily raised the minimum requirements of its nurses in its Medical Department,* and had not bargained in good faith in violation of Section 8(5) and 8(1) of the said Act. It further charged in general and broad terms interference with, restraint and coercion of its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(1) of the Act.

A complaint issued by the Regional Director charged Messrs. Vernon, Shanahan, Liegal, Powell and Stuart

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*This charge was dropped.

with interference with union employees; the discharge of Fisher for union activities; the discharge of Williamson for union activities; refusal to bargain collectively with respect to rates of pay, wages, hours of employment, and other conditions of employment, and in broad and general terms coercion of its employees in violation of the rights guaranteed in Section 7 of the Act [Complaint, 4]. It will be noted that some of the specific charges contained in the Union's charge were not incorporated in the complaint of the Regional Director.

A bill of particulars was ordered by the Board, pursuant to demand [Board's Ex. 1-J, 26].

The Company's answer [Board's Ex. 1-G, 16] denying the allegation of general unfair labor practices, denied that Fisher had been discharged for union activities and asserted that he had been discharged for violation of regulations set forth in the Company's rule book; denied that the discharge of Williamson had been for union activities but stated that Williamson was justifiably disciplined for making an unwarranted disturbance at his place of work and subsequently by an agreement with the Union he had been reinstated without loss of seniority or without loss of his status as a union committeeman and averred that the Union had sent a written notice to the Board withdrawing the charges filed by the Union in connection with Williamson. Further answering the Company set forth the provisions of the agreement as to grievances and arbitration which had not been resorted to.

Pursuant to notice a hearing was held in San Diego in September, 1942, before a trial examiner, at which both the Board and the Company were represented by counsel. The Union was not represented by counsel. At the close

of the Board's case counsel for the Company moved to dismiss the complaint and each of its allegations for failure of proof, which motions were renewed at the close of the hearing and denied by the examiner thereafter in his intermediate report. Oral argument was heard and briefs filed with the trial examiner. Thereafter the trial examiner filed his intermediate report dated October 16, 1942 [32]. In the intermediate report the trial examiner found that the Company had violated the Act in that it failed to bargain collectively with reference to (1) interim individual wage increases; (2) the petitions and notice as to work on Sunday, December 13, 1941; (3) increase of wages of the crane operators; (4) fixing of wages of the third shift; (5) employees hired outside California; (6) adopting a schedule of job classifications; and had therefore refused to bargain collectively in violation of the rights guaranteed by Section 7 of the Act.

A very large part of the record was taken up with the controversy as to whether Fisher, chairman of union shop committeemen, and Williamson, shop committeemen, had been discriminated against and discharged because of union activities. The intermediate report found against the Company on those issues. It further found that there had been interference, restraint and coercion in the cases of several employees—Condon, Shannon, and employees referred to in a memorandum from C. W. Perelle, the Vice President; that the charges with reference to coercion of Blake and Barnes had not been sustained.

The intermediate report recommended that Fisher be immediately reinstated but did not recommend reinstatement of Williamson because he had been previously reinstated by the Company to the satisfaction of the Union, and that the Company affirmatively agree to bargain collectively with the Union, and post a notice that it would not engage in the conduct from which it is recommended that it cease and desist, viz., refusal to bargain collectively, discrimination in regard to the hire and tenure of employment and in any other manner interfering with or restraining or coercing its employees in the exercise of the rights guaranteed under Section 7 of the Act.

The case was argued orally before the Board in Washington, where both the Union and the Company were represented by counsel. On February 18, 1943 the Board handed down its decision and order [90] in which the Board dismissed without prejudice charges that the Company had refused to bargain collectively within the meaning of Section 8(5) of the Act; dismissed without prejudice the charge that the Company had discriminated with regard to the discharge of Fisher and Williamson within the meaning of Section 8(3) of the Act and found affirmatively that the Company had not engaged in unfair labor practices within the meaning of Sections 8(5) and 8(3) of the Act [118], but found that the Company had interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and issued an order that the Company cease and desist from such practices and post a notice with reference thereto in its San Diego plant. The evidence as to the acts of interference, restraint and coercion is discussed under the respective points.

OUTLINE OF ARGUMENT.

Point I.

The Company's conduct in connection with (a) the interim individual wage increases, (b) the petitions and notice of December 13, 1941, (c) the crane operators, (d) the employees hired outside California, (e) the third shift and (f) job classifications did not constitute interference with, restraint or coercion of the rights of the Company's employees guaranteed in Section 17 of the Act.

The evidence as to the matter referred to is not in substantial dispute. In fact, it is uncontradicted. The Company contends that where a collective bargaining agreement has already been entered into, acts resulting from difference of interpretation of the agreement, which can be made the subject of grievances and which must by the terms of the agreement be submitted to arbitration in the event of dispute, are not a failure to bargain collectively, as found by the Board [Finding 5, 118], and are not in law acts of interference with, restraint or coercion of its employees affecting commerce; that under the circumstances of the case none of the unilateral acts found by the Board constitute acts of interference with, restraint or coercion of its employees under Section 7 of the Act.

Point II.

The Company by the statements of its employees to Williamson and Fisher has not interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

The statements referred to by the Company employees to Williamson and Fisher were conversations which preceded the discharge of both Fisher and Williamson for alleged union activities. The circumstances surrounding Williamson's discharge show that he was not discharged for union activities. Fisher was discharged for persistent violation of rules. The Board has dismissed the charges, founded upon such dismissals, that the Company engaged in unfair labor practices [Finding 4, 118].

Point III.

The Company by the statements of Treasurer Shanahan to Shannon has not interfered with, restrained, and coerced its employees, as the circumstances show that such statements were fully justified in criticism of the attempt of the Union in the wage review board to coerce non-union men into joining the Union in violation of the contract providing that it would not discriminate against non-union men. The remarks to Condon were isolated and trivial.

Point IV.

The Company by the bulletin of Vice President Perelle requiring employees to give up their membership in the Union when they were promoted from hourly wage to salary has not interfered with, restrained, or coerced its employees.

The record does not show that anything resulted from the acts or statements of either Wiseman or Perelle.

Point V.

In order to justify the present entry of an order directing the Company to cease and desist from unfair labor practices there must be substantial evidence as to a course of conduct of unfair labor practices in the past from which reasonable inference can be drawn that such practices are likely to continue in the future.

Point VI.

A cease and desist order is unjustified upon the record.

The Issue.

The Board found that the Company had not engaged in unfair labor practices within the meaning of Section 8(3) of the Act, as alleged in the complaint as to discrimination in the hire and tenure of employment of employees, and that it had not engaged in unfair labor practices within the meaning of Section 8(5) of the Act by refusing to bargain collectively with its employees, but that it had interfered with, restrained and coerced its employees in the exercise of rights guaranteed under Section 7, within the meaning of Section 8(1) of the Act. The Board held that all of the matters in which it was claimed that the Company had taken unilateral action, while not a failure to bargain collectively because they involved the interpretation of a collective bargaining agreement already in existence and were subject to mandatory arbitration, constituted interference with, restraint or coercion of the rights of the employees, and that various statements of supervisory personnel of the Company had been made which similarly interfered with, restrained or coerced its employees.

Section 7 of the Act is as follows:

> *"Rights of Employees:*—Section 7—Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 8(1) of the Act provides that interference with, restraint or coercion of its employees in the exercise of the rights guaranteed by Section 7 constitutes an unfair labor practice.

The case presents for determination the question whether the acts and statements of the Company made subsequent to an agreement of collective bargaining already entered into with representatives of its employees, did, in fact or in law, amount to an interference with, restraint of, or coercion of the Company's employees in the exercise of the rights guaranteed under Section 7.

ARGUMENT.

POINT I.

The Company's Conduct in Connection With (a) the Interim Individual Wage Increases; (b) the petitions and Notice of December 13, 1941; (c) Crane Operators; (d) Employees Hired Outside California; (e) Third Shift; and (f) Adoption of the Schedule of Job Classifications Did Not Constitute Interference With, Restraint or Coercion With the Rights of Its Employees Under Section 7 of the Act.

The decision and order of the Board dismisses the charge that the Company failed to bargain collectively with reference to the matters enumerated. The Board's decision comments upon the Company's willingness to bargain with the Union as to these matters after objection had been made by the Union, points out that all but two of these issues had been amicably settled as a result of collective bargaining between the parties prior to the hearing. It further points out that as to the two unsettled issues, the third shift and the job classification schedules adopted by the Company, the Union made no attempt to utilize the grievance or arbitration machinery established by its collective bargaining contract with the Company. The contract provided that any dispute between the parties as to the terms, conditions or rates established in the agreement must, if not amicably settled, be taken to arbitration.

The Board, in its opinion, stated "We are of the opinion, however, that it will not effectuate the statutory policy of 'encouraging the practice and procedure of collective bargaining' for the Board to assume the role of

policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement process mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board. We therefore do not deem it advisable to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen"* [111].

Nevertheless, the Board found that by the Company's unilateral action in regard to matters within the scope of its contract with the Union, the Company had engaged in unfair labor practices.

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*The Board's decision, in substance to the effect that differences of opinion as to the interpretation of a collective bargaining agreement already entered into do not in themselves constitute further failures to bargain collectively, is in accord with its decision in the *Matter of Essex Wire Corp.* (1940), 19 N.L.R.B. 51, in which the concurring opinion of Mr. Leiserson stated (pp. 65, 66):

> "We have here no question of a refusal to bargain collectively but a simple and typical dispute as to the meaning or application of a provision in an existing collective bargaining agreement. * * * Any attempts to handle such disputes about the meaning of agreements by charges and complaints of unfair labor practices can only result in breaking down of collective bargaining and the administration of agreements between employers and unions.
>
> "It was clearly not the intention of Congress that differences as to the interpretation or application of agreements should be treated as unfair labor practices under Section 8 of the Act. I am of the opinion therefore that the complaint should be dismissed."

This reasoning applies with stronger effect where the agreement itself provides for mandatory arbitration, as in the collective bargain agreement in this case.

In this instance the employees had already organized, formed or joined a labor organization. They had bargained collectively with the Company through their own representatives, the results of which had been formulated in the contract between the Company and the Union which had been in force for several years. They had already joined together for mutual aid and protection. The Company agreed to recommend to its employees that they join the Union. How then can action by the Company which may be made the subject of grievances and arbitration be regarded as violation of the rights under Section 7?

It is necessary to emphasize this point by reference to the undisputed facts.

(a) Interim Individual Wage Increases.

In November, 1941, the Company's works manager, without consultation with the Union, informed all department heads that no further interim increases of wages were to be granted until April, 1942. Subsequently, in January, 1942, after conferences as to protests of the Union, the Company published a bulletin to all department heads revoking this notice as follows:

"Consolidated Aircraft Corporation
San Diego, California

January 22, 1942

Memo to: All Department Heads

Subject: Policy with regard to Interim Wage Increases

I have been informed that the Union has interpreted my memo of 11 November 1941 on the above subject as a violation of that portion of Sec-

tion 3 of the Union Agreement which reads as follows:

> 'In accordance with past practice, the Company will approve interim individual increases when justified, after consulting the Foreman and the Union Committeeman of the Department concerned.'

It is this Company's policy to comply fully with all provisions of the Union contract. If a Foreman or Department Head feels that an employee merits an increase before the next wage review period, such increase will be approved providing the new rate falls within the approved rate range for the job. Rate ranges for the various jobs have been, or will be, established under the jurisdiction of the Wage and Salary Committee.

I. M. Laddon
Vice President and General Manager"

[Board's Ex. 7, 221.]

Subsequently, in the early part of 1942 various increases were made to employees in the Inspection Department without consulting the union committeeman and the Union again protested [Brown, 526]. The Company offered to stop the effective date of the increases and have them renegotiated between the union committeemen and the foreman or the supervisors in charge. Brown replied that what they did in relation to putting the increases into effect or not was inconsequential to the Union; that the violation had already occurred and that the Company could do what it pleased [526]. At that time the Company and the Union had not arrived at any understanding that they now have with reference to matters of procedure as to interim merit wage increases [526].

In April, 1942, after consultation with the Union, Mr. Leigh, Vice President and Assistant General Manager, issued a bulletin with reference to the consultation with union committeemen on interim wage changes [Respondent's Ex. 1, 253]. This bulletin provided in detail for the procedure to be followed by the foreman with reference to consultation with union committeemen as to interim merit increases of employees. It provided that if the foreman and the committeeman agreed to the change it could be initiated at once, but otherwise the matter was to be referred to the general wage committee, which was to meet and review all proposed merit increases.

Mr. Roy Brown, Grand Lodge representative, testified with reference to this matter:

> "We arrived at a satisfactory solution to handle all of those particular cases and also the cases in the future, but only after the damage had been done by the action of the Company in that case.
>
> Q. Would you consider that the Company did the best it could to repair the damage? A. Well, let's say that the Company sat down and bargained with the Union at a date after this offense had been committed and we had arrived at a satisfactory conclusion" [527].

Phillips, the union business agent, testified:

> "Q. Can you state of your own knowledge any case at the present time where that procedure outlined by Mr. Leigh is not being followed? A. No, I think the Company is following it very closely at the present time" [257].

He also said:

> "If this is followed in the future it will suffice" [257].

(b) The Petitions and Notice of December 13, 1941.

There never was an episode which less justified a charge of interference with employees' rights than this particular affair.

The attack on Pearl Harbor had occurred and war had been declared on December 7th. The Company's plants in San Diego are located on the Pacific Ocean in as vulnerable a position for air raid attack as can be found anywhere in the United States. It is engaged exclusively in the production of heavy bombers and flying boats for the United States Government. There was intense apprehension that the raid upon Pearl Harbor might be followed by raids upon airplane plants on the Pacific Coast.

On December 10th a blackout had been ordered by the Army which blacked out the complete plant and threw all the men on the night shift completely out of work. The number of man hours lost was sufficient to have built a complete B-24 bomber [Superintendent Newman, 835]. The plant then had glass skylights and windows. A petition was signed by the men on the night shift at the Parts Plant the next day asking that the plant be blacked out, and volunteering to do the work on their own time [Respondent's Ex. 12, 788]. This petition, a sample of which is included in the record, demanded that necessary steps be taken immediately for the complete painting of all windows, roof skylights, and white stucco walls throughout the entire plant, and stated:

> "It is the will of the undersigned to continue the work during these blackouts which are so necessary and vital to the defense of our country.
>
> "The following gladly volunteer their time to perform this task during daylight hours but we again demand immediate action."

The Company published a bulletin on Saturday, December 13th, to the effect that men who wanted to work that Sunday could do so voluntarily or by punching the clock they could obtain time and one-half [Board's Ex. 15, 339]. This notice stated that in line with President Roosevelt's desire for a seven day work week, employees who volunteered to work on Sunday could do so or others could ring their time cards and receive pay at time and one-half. The notice applied only to certain jobs in Jigs and Fixtures, Tool Room, Machine Shop, Fuselage, Paint Shop, Sheet Metal, Metal Bench, Welding and Black-out Painting, and to no other departments.

Petitions were circulated in the plant and signed by thousands of employees, of which a sample was placed in evidence to avoid a multiplicity of exhibits. It read as follows:

> "Consolidated Aircraft Corporation
> San Diego, California
>
> "In view of the present war situation we, the undersigned, offer to work this Sunday at time and one-half" [553].

The Union, however, became very much disturbed and held a meeting on Saturday, December 13, after objecting over the telephone to the circulation of the petitions, and agreed to allow the members to work "and we would discuss what they were to be paid later" [Perry, 462]. There was even a discussion as to whether or not the Union would picket the plant, in spite of the anti-strike agreement [Perr, 462]. It was conceded that the matter was settled and that every employee who worked that Sunday received double time [Perry, 462, 463].

The officers of the respondent were confronted with an unexpected outbreak of war, followed by orders from the Army blacking out the plant, which seriously interfered with war production. The employees themselves signed petitions to work on that Sunday at time and one-half. Whether these petitions were initiated by the employees or by the Company does not appear in the record and is immaterial. The officers used their best judgment in this emergency to comply with the President's request and their failure to take the matter up with the Union prior to posting of the bulletin was not a violation of any employees rights.

(c) Crane Operators.

During February, 1942 there was discussion between the Union and the Company as to the pay of crane operators, the wage rates for which had been fixed in May, 1941. Between May, 1941 and 1942 there had been a 5¢ an hour and a 13¢ an hour blanket increase. The Union claimed that the increased rate should apply as a starting rate to crane operators hired subsequent the increases [Phillips, 233]. The Company disagreed, possibly on the ground that length of service, skill and aptitude would justify different hourly rates for old and newly hired men. The matter was the subject of negotiations and conferences in which each side maintained its position. No agreement was reached with reference to this issue, but the matter was subsequently settled by agreement with the Union that the cases should be settled individually by the wage review board [463].

(d) Employees Hired Outside of California.

About 22 men were hired by the Company outside the State of California at specific wages for specific work, mostly skilled machine work. After their arrival at the San Diego plant, without notice to the Union, the Company decreased the wages or changed the position of the great majority of these employees. The Company charged that some of the men had misrepresented their capabilities and that the Company was paying them what they were worth. The matter became the subject of continued discussions and negotiations between the Union, the Company and a conciliator of the United States Depart of Labor, and the matter was settled to the complete satisfaction of the Union and amicably disposed of [See Board's Ex. 11(a), (b) (c) and (d), 295]. In some instances the Company paid the fare of employees to their homes.

(e) Third Shift.

The change in March, 1942 from a two-shift daily operation to a three-shift operation was made after full consultation with the Union [Brown, 511, 513] and the operation on three shifts was proposed by the Union and requested by the Union [Brown, 529].

He testified:

> "Q. Did you want the operation on three shifts? A. We proposed the operation on three shifts.
>
> Q. A change from two-shift to three-shift operation was satisfactory to the Union? A. Yes. Yes. We felt that production would be enhanced by three-shift operation instead of working the men such long hours" [529].

* * * * * * * * *

"Q. But in any event, the change from two-shift to three-shift operation was satisfactory to the Union? A. The change in itself was satisfactory to the Union, but not certain features [421].

Q. Wait a minute. And requested by the Union? A. Yes. Yes.

Q. But your only grievance, then, with reference to the change from two to the three shift is in relation to what they call the graveyard shift working on Sunday? A. That is the shift from 12:00 midnight Saturday to 7:00 a. m. Sunday morning."

It was agreed that the employees on the third shift would not only receive the 8¢ differential paid for night work, but in addition would receive 8 hours pay for 6½ hours work.

The only controversy with the Union was whether the shift on Sunday morning should receive double time or time and one-half as insisted by the Company. The contract provided that work on the seventh consecutive day should be paid for at double time [Board's Ex. 3, Sec. 5, 151]. The contract is very clear that it is only after overtime on the sixth consecutive day of work that double time is payable on the seventh consecutive day. The Company insisted that the third shift started work at midnight Monday and worked for five consecutive days, that the shift beginning at midnight Sunday constituted the sixth consecutive work day, for which time and one-half should be paid. The shift is off duty from Sunday morning at 7:00 a. m. to Monday night at midnight, affording a complete day of rest. It works only six consecutive days and does not therefore work seven consecutive days.

The interpretation as to the pay to be received by the third shift on Sunday is in accordance with the contract. It is also in complete accord with the President's Executive Order No. 9240 of September 9, 1942, issued after the hearing was closed, from which it is clear that double time is not to be paid for work on Sunday as such, but only upon the seventh consecutive day of work, so that the employer may be more disposed to grant to the employees one complete day of rest in seven. The Union failed to file a grievance with reference to this matter and failed to take the matter to arbitration. It was the subject of negotiations in which each side maintained its position. Congress never intended that this sort of a controversy should result in an unfair labor charge.

(f) Job Classifications.

The job classifications were set up by the major aircraft corporations in Southern California and they established classifications and rates to apply to the classifications [Phillips, 237].

The Company maintained that the schedule of minimum and maximum rates of pay for literally hundreds of job classifications adopted by the Company, substantially in accord with other aircraft companies in the Southern California area, were used as guides in the wage review heard. The Union charged in substance that they put a ceiling on wages and had been adopted unilaterally.

Mr. D. G. Fleet told the history of conferences with reference to stabilization of wages among the aircraft companies in Southern California, beginning in 1941. The original union contract adopted in June, 1941 provided in substance [Respondent's Ex. 10, not printed by

consent], that in the event standard rates of pay should be adopted for the industry by any executive order or ruling of the President of the United States or by the National Defense Mediation Board, the rates of pay and wage rates therein provided for should be superseded by such order or ruling [Fleet, 772].

The aircraft companies had been endeavoring at that time to work out stabilization and uniform classification of jobs at meetings called by Mr. Sidney Hillman of the Office of Production Management, with the idea that when stabilization was adopted by governmental fiat, classifications and rates of pay so adopted would be adopted by all companies.

Thereafter one of the companies adopted a minimum wage scale [Fleet, 775], and all the aircraft companies in Southern California were invited to attend a conference with reference to wage stabilization in Washington in the summer of 1941 [Fleet, 776], which was attended by executives from the aircraft companies and Union officials [Fleet, 777]. This failed because of differences between the C. I. O. and A. F. L. [Fleet, 777].

After this conference Lockhead-Vega gave a 10 cent an hour blanket increase to their employees retroactive to July 1, 1941 [Fleet, 778]. Consolidated had previously granted a 5 cent an hour increase, effective May 3, 1941 [See Board's Ex. 3, Sec. 3, 150], and the Union immediately peremptorily demanded a 10 cent blanket increase retroactive to the first full pay day on July 1 and demanded an answer in twenty-four hours [Respondent's Ex. 11]. The Company made counter-proposals [Fleet, 692] and offered a 5 cent blanket increase, as an increase of 10 cents per hour would bring the Consolidated em-

ployees above the Lockheed-Vega rate [Fleet, 783] and again result in inequalities between the companies. At this stage of the proceedings the Union took a strike vote [Fleet, 784] in spite of the provision in the agreement by which disputes must be submitted to arbitration, and in spite of the provision in Section 23: "The Union agrees that there shall be no strike or slow-down, and the Company agrees that there will be no shut-down or lock out, while matters are being considered under this section."

The matter was certified to the National Defense Mediation Board, which granted a 13 cent per hour increase in lieu of certain other provisions of the contract which were eliminated, such increase being retroactive to August 9 [Fleet, 785, 786].

Sections 2 and 3 of the Union agreement therefore were amended to show the higher pay rates negotiated under the National Defense Mediation Board and agreed to on October 18, 1941 [See Board's Ex. 3, 146].

The contract then in existence was amended to provide for an individual merit wage review for each employee upon completion of each individual's six months period of continuous employment [Board's Ex. 3, Sec. 3, 146]. In other words, as a result of this increase and the negotiations before the National Defense Mediation Board, in which the officials of the Company and Union officials participated [748], the previous agreement, by which the Company and the Union agreed to establish a joint committee to review hourly wage rates by mutual agreement, was subsequently amended to provide for the review of each individual's wage rates at the end of six months employment.

Under this provision the Union has claimed and has obtained the right to have a wage increase of each individual employee determined by the wage review board upon its merits. We maintain that by this change the Union relinquished any claim to bargain as to rates of any particular job classifications.

However, the whole matter of job classifications and wage rates of all Southern California companies then passed into government supervision. Discussions as to wage stabilization among the aircraft companies were continued at Hollywood in July, 1942 at the invitation of the War Production Board, at which both the representatives of all the companies and the employees were present [Fleet, 703-B] but broke up because of disagreement between the government agencies as to jurisdiction [703-B].

During this time the Company, without concurrence of the other companies, could not bargain with the Union and increase or decrease wage rates as to any particular job classification.

The Court should take judicial notice of the fact that since the close of the hearings in this matter the National War Labor Board has conducted lengthy hearings, at which voluminous evidence was presented by the representatives of all aircraft companies on the Pacific Coast and the representatives of the Unions, upon the question of stabilization of wages and classification of jobs. In order to confer exclusive jurisdiction upon the National War Labor Board, the Secretary of Labor on October 23, 1942, under the authority of Executive Order 9017, certified a dispute between the Company and Aircraft Lodge No. 1125 to the National War Labor Board.

On March 3, 1943 the National War Labor Board, in the matter of the West Coast Aircraft Companies, handed down a directive providing that a uniform job classification and wage rate schedule applicable to all employees of aircraft companies in the Southern California area should be established and apply in each of the California plants. Thereafter by order dated March 9, 1943 it created the West Coast Aircraft Committee consisting of five members for the Southern area, one of whom should represent the public, two industry and two labor. The West Coast Aircraft Committee now has exclusive jurisdiction over uniform job classifications and wage rate schedules for both productive and non-productive employees.

The National Labor Relations Board has been superseded and lost all jurisdiction. We maintain that by a series of executive orders, the act to amend the Emergency Price Control Act of 1942, Public Law No. 729, and the orders of the National War Labor Board, the Board has lost all jurisdiction over controversies as to job classification and stabilization of wages prior to the date of its order, and could not find at that time that the Company's unilateral adoption of wage schedule was an interference with its employees. (See Exception 85.)

The Board in its opinion disregards the Company's position with reference to job classifications with the casual statement: "It (the Company) further contends that the fact that the entire matter of wage stabilization, including job classification and wage rates, is now under consideration by the Government, makes it impossible for the respondent to bargain with the Union regarding it" [103].

We assert confidently that in no cases involving the interpretation of the Act can there be found any simi-

lar situation, in which, in order to stabilize wages in a particular area and prevent inflation, the matter of schedules of rates of pay has been negotiated between a group of companies and groups of employees under the jurisdiction of the National War Labor Board, and an individual company is held to be guilty of an unfair labor practice because of its failure, when it was unable to do so, to negotiate job classifications and wage rates within such classifications with the Union representing its own particular employees.

In *National Labor Relations Board v. North American Aviation, Inc.,* decided June 24, 1943 (C. C. A. 9th) the Board had issued an order that the Company cease and desist from its unfair labor practices, that, upon request, it bargain collectively with the Union, and inform its employees that a notice hereinafter referred to was null and void. After the formulation of a bargaining agreement with the Union, which contained a provision as to grievances, the Company published a unilateral notice permitting individual employees to present grievance directly to the management. The Board stated that the sole issue was whether, after a grievance procedure had established by agreement between the Company and the Union as the exclusive bargaining representative of all of the employees, the Company was free unilaterally to establish a separate grievance procedure for the adjustment of grievances presented individually by the employees. The Company claimed that the notice was justified under Section 9(a) of the Act which had been, in substance, incorporated into the collective bargaining agreement. This Court upheld the Company's unilateral action and set aside the order of the Board upon the

ground that the Company's action was justified. The same reasoning applies to the unilateral acts in this case.

There are cases that the action of the employer in an apparent effort to settle unilaterally a matter with respect to which the employees have requested collective bargaining is a violation of Section 8(5) of the Act. In these cases the employer, during a request for negotiation of a collective bargaining agreement, took action on the very points which the employees had made the subject of the negotiations. Such unilateral action cut the ground from under the employees pending the formulation of a collective bargaining agreement. But these cases have no bearing upon the facts of this case. The Company had entered into a bargaining agreement. The management of the Company was justified in taking a position as to the interpretation of the agreement, and in announcing its position and in maintaining it in negotiations. The Union could have taken the issue to arbitration but failed to do so. The real grievance is that the Company failed to agree with its contentions as to the third shift and job classifications. If the management of a Company which has entered into a collective bargaining agreement must consult the agency prior to determining upon an interpretation and agree with the agency, industry must surrender management to its employees. It needs no citation of the many cases to demonstrate that Congress never intended to clothe the Board with authority to order that employees may interfere with the management. Where there is a provision for mandatory arbitration of disputes in a collective bargaining agreement, thereafter acts of the Company pass out of the realm of collective bargaining and into the domain of judicial settlement by arbitration.

POINT II.

The Company by the Statements of Superintendent Liegal to Willliamson and Fisher, Its Employees, Did Not Interfere With, Restrain or Coerce Its Employees in the Rights Guaranteed in Section 7 of the Act.

The Board has found that the Company had not engaged in unfair labor practices within the meaning of Section 8(3) of the Act as alleged in the complaint. In the complaint it was alleged that the discharges of both Fisher and Williamson were in violation of Section 8(3), so that the Company has been absolved of anti-union discrimination in the discharges of Williamson and Fisher. Nevertheless, the Board has found that Liegal called Williamson a "labor agitator" at the time of his discharge, and that the reason given for his discharge on his termination slip was "agitator" and that this was an interference with the rights of its employees.

It should be understood that immediately after Williamson's discharge, the Union took up the matter with the Company and that after some negotiations with reference thereto Williamson was reinstated by agreement with two weeks' disciplinary layoff. Thereupon the Union wrote to the National Labor Relations Board as follows:

"April 30, 1942

The National Labor Relations Board
United States Post Office and
Court House Building
Los Angeles, California

Attention: Mr. Roger Maguire, Field Representative

Gentlemen:

This letter will serve as your official notice that in the matter of the charges now pending against the Consolidated Aircraft Corporation, which charges were filed by myself in behalf of Aeronautical Mechanics Lodge No. 1125 and relating specifically to Mr. Oliver H. Williamson, have been settled to the satisfaction of our organization. Therefore, we wish to withdraw the particular charges against the Consolidated Aircraft Corporation.

With best regards and thanking you for your cooperation in this matter, I am

Very truly yours,

Roy M. Brown
Grand Lodge Representative I. A. of M."

[Respondent's Ex. 5, 535].

Nevertheless, the Union in its second amended charge again referred to the discharge of Williamson, and the Board's complaint [Par. 6, 6] makes a separate charge with reference to the matter. The Board's decision finds: "With respect to Williamson, the record shows in addition that the question of his discharge was settled to the mutual satisfaction of the parties through collective bargaining, and we see no reason under the present circumstances for interfering with this settlement" [112].

We maintain that the isolated statement therefore of Superintendent Liegal to Williamson at the time of his discharge, assuming that he was called a labor agitator or agitator, is out of the case and cannot and should not be made the basis of a finding of either interference, coercion or restraint.

An examination of the circumstances under which the discharge occurred shows that Mr. Liegal's statement was fully justified and that Williamson was discharged for creating a disturbance, attacking the Company, and making a speech against the management in the plant during working hours in the presence of approximately ten other workmen when he claimed to be on his own time and not on union business.

The right to indulge in Union activities free from any restraint or coercion by the employer does not give the employee the right to vilify his employer.

In *National Labor Relations Board v. Union Manufacturing Co.*, 124 F. (2d) 332 (C. C. A. 5th) the Board had ordered the reinstatement of an employee who had been discharged for union activity and had excused the employee for calling one of his superior officers a liar and the other a gambler, on the ground that he was representing the union and was entitled to the dignity of equal standing. The Board ordered him reinstated and said:

> "The presumption is that the employer has not violated the law and the burden of proof is not upon the employer but upon the one who asserts the fact, to prove that the discharge was because of union activities."

The uncontradicted testimony shows that Williamson protested because of the discharge of a young man named Brown. Brown refused to obey orders and to do a certain rush job for a foreman because the foreman spoke with a German accent [41], Brown's foreman had told him that he could quit [172]. Subsequently a plant policeman came up behind Brown and told him to pack up his tools [172], which was the usual procedure when a man was discharged [172]. Williamson said he wanted to see Brown's foreman, Hangen, to see whether Brown had quit or whether he had been fired [173], and said he would take off his committeeman's badge, put it in his pocket, go over and ring the time clock out, and have a talk with Liegal in the presence of a representative of the Federal Bureau of Investigation on his own time [175]. Williamson said:

> "I still have a matter that I would like to discuss with the Superintendent about the steady advance of the German born jig builders, the constant lowering of morale and the lowering of production in the department" [177].

There was further conversation with Liegal in which Williamson claimed that Liegal said "You are one of those damned union agitators" and Williamson was thereupon discharged and his termination slip marked "Discharged —agitator" [Board's Ex. 4, 179].

Upon cross-examination he said that Brown told him the reason that he wanted to quit was that he refused to work under Ewert because Ewert did not speak enough English to understand the man. Williamson admitted there were possibly ten employees [198] who stopped work when he started to remonstrate with the officer

about escorting Brown out. He denied saying that the Axis controlled the plant and that it was full of Germans, but he did admit "I did say something that they had pushed around about eight of our good American boys while the Germans in the plant were constantly getting raised" [200], and that when he saw the policeman taking Brown out he "got hot under the collar" [197].

Williamson testified:

> "Q. Wasn't Liegal pretty mad when you told him about the Federal Bureau of Investigation and the Germans in the plant, he being German, and one of the foremen in the plant? A. I imagine he was mad" [203].

Further, he said:

> "Q. Why did you take off your shop committee badge? A. Because production was continuing tc fall down and down and I had seen eight good American boys with Anglo-Saxon names run out of the plant, one after another, while I sat in the wage review as a committeeman, and saw every man with a German name recommended for top money, and all the talk and propaganda in the newspapers as to the falling off of production in the Consolidated plant was the fault of the Union, and I thought 'Ye Gods. Here comes a guy that is going to pin this drop in production on our organization.' That's why I took it off.
>
> Q. It was entirely your own suggestion that you take it off? A. Yes" [204, 205].

Williamson made it clear that it was other than union business which caused him to take off his badge [205].

The testimony of Crausen, plant police officer, was that Williamson was talking very loud and had 12 or 15 men standing around him listening [559]. Williamson said that the foremen were working for a foreign Government and he heard them talk to each other in German and when any one walked up they would shut up [561]. Eastin, a foreman, testified that Williiamson objected to Brown's being escorted out of the plant, and that he said in a very loud voice that that was no way to treat an American boy, that "we were foreign agents, if we discharged men indiscriminately, if we didn't treat the boys right, that we acted as foreign agents, that we were pushing good American boys around" [565]. He was shouting and almost yelling and about 9 to 15 men were clustered around him [566]. Williamson stated that this was not a union matter and ripped off his union badge [569].

Hangen, a foreman, testified that Brown refused to work under Ewert because he spoke with a German accent. Wiliiamson stated that he was working for Nazi bosses and that

> "we are gradually getting rid of all the good American boys and keeping nothing but the Germans and thought it was—he said he felt it wasn't a union problem any more; he did not care to talk with us; he preferred to call in the FBI on the case because he felt we were not the right ones to talk to about it" [75].

Liegal testified that when he was called he found Williamson with any where from nine to ten or twelve men surrounding him within a distance of five, ten or fifteen feet; that he was addressing the men in general and waving his arms around his head and very excited

and talking in a loud tone of voice [76]; that he said the Union was out of this; that in talking to the men around he said the foremen were working for the German Government, the Nazi Government and words to that effect and

> "I did tell them that all of us were to some extent foreigners. I personally—my grandparents were born in Germany and naturally all of us were to a certain extent foreigners—that is, they were born in a foreign country" [583].

They then started to go to Liegal's office and on the way they met Hangen, and the matter started all over again about working for foreigners or Nazis and finally Liegal said to Hangen "This is a hopeless case do what you please about him." Liegal had never seen Williamson before this incident [479].

No anti-union discrimination is shown in the uncontradicted testimony as to this affair in which Williamson and possibly Liegal lost their tempers. No self respecting superintendent could permit a speech of such character to be made to employees of the plant with any expectation that discipline could be maintained thereafter. No self respecting superintendent could stand for such insulting language as to be called or have it inferred that he was a German agent. There is no testimony whatsoever that Brown, as to whose discharge Williamson was concerned, was a union member. The uncontradicted testimony shows that Williamson took off his union button and voluntarily ceased to function as a union shop committeeman. It is not disputed that Liegal had never seen him before. His dis-

charge was fully testified whether he was called a "labor agitator" or a plain agitator. He was reinstated because he was a good worker and given a two weeks layoff.

Fully half of the voluminous testimony in this case was taken up with the Fisher discharge. The Board found the Company had not engaged in unfair labor practice in this discharge. The Board has found, however, that the statements of foremen Liegal and Powell, and Plant Manager Newman, to Fisher, constituted a violation of the Act.

Fisher was chairman of the union shop committeemen in the Parts Plant. The explanation of the Company as to his discharge was that he had flagrantly disregarded rules made by the Company with reference to leaving the department on union business without permission of his foreman.

The courts have always held that the question of motive is extremely difficult to determine.

In *Martel Mills Corporation v. National Labor Relations Board,* 114 F. (2d) 624 (C. C. A. 4, 1940), the court said at page 631:

> "We do not lose sight of the fact that our inquiry is centered upon the motivating cause of the employer's action. The task is a difficult one. It involves an inquiry into the state of mind of the employer. Such inquiry is laden with uncertainties and false paths. Obviously our chief guide is the words of the witness under oath who undertook to disclose the workings of his mind. *If his explanation is a reasonable one, the onus is upon the Board to establish the falsity of this explanation and the truth of its own interpretation* * * *. We are not con-

vinced that the Board has offered sufficient evidence to meet its burden of proof. Isolated statements which alone carry incriminating import often lose their ominous significance when surrounded by all the facts of a given case. We do not find substantial evidence to support any illegal motive such as is proscribed by Section 8(3) of the Act." (Emphasis supplied.)

See, also:

Quaker State Oil Refining Co. v. National Labor Relations Board (C. C. A. 3d, 1941), 119 F. (2d) 631;

National Labor Relations Board v. Sheboygan Chair Co. (C. C. A. 7th, 1942), 125 F. (2d) 436;

National Labor Relations Board v. Union Mfg. Co., (C .C. A. 5th, 1941), 124 F. (2d) 332;

American Smelting and Refining Co. v. National Labor Relations Board (C. C. A. 8th, 1942), 126 F. (2d) 680, 687;

National Labor Relations Board v. Tex-O-Kan Flour Mills Co. (C. C. A. 5th, 1941), 122 F. (2d) 433.

It is essential that the statements be examined in the light of circumstances out of which they arose.

Fisher testified that he joined the Union early in 1940 and was active in organizing his department; early in 1940 Liegal had told him that if it wasn't for his union activities he would be able to do something for him in procuring for him a job as leadman, a job that he had asked for [326]. He was discharged in July, 1940, and he claimed

that his discharge was due to the fact that he had opposed, at a meeting of the Union, a suggestion from the management that the employees work 40 hours before being paid over time [328, 329]. The reason given for his discharge, which was by Borg, the leadman of his department, was that he was unqualified for the work [327]. A grievance was filed and he was rehired in August, two weeks after his discharge, under the supervision of Waskey, who was then President of the Union. There was no testimony whatever that any one connected with the Company, knew of Fisher's action in opposing the motion or that his opposition was important. The trial examiner found that since the complaint did not allege that the respondent discriminated against Fisher by this discharge, that no finding of unfair labor practice was based thereon [51]. Waskey, the former President of the Union, testified that he had asked Kelly, works manager, to rehire Fisher just in order to make the situation a little better for the Union and Kelly complied and said that Waskey would have to take care of him [615]. Waskey said that Fisher was a very difficult man to work with, but that he would try to teach him his job and put him by himself so that he would have no excuse to bother anybody [616].

In January, 1941, Fisher became a chairman of shop committeemen, and in July, 1941 was transferred to the Parts Plant, approximately one-half mile from the Home Plant. This plant had just commenced operations. There had been no requirement that committeemen obtain special permission from his foreman in order to leave a department at Plant One but had simply been required to notify the foreman's clerk. The controversy with refer-

ence to Fisher's disobedience of rules thereafter hangs upon two bulletins which were published by the manager of the Parts Plant subsequent to his transfer in July, 1941. On July 23, 1941 a bulletin was published by Mr. Newman, Parts Plant Factory Manager, which provided:

"23 July 1941

Memo to: Shop Personnel
Subject: Leaving the Department

With the exception of those men who have been duly designated by their foremen for contact work between the Home Plant and the Parts Plant, no one is permitted to leave their department without the permission of the Foreman in charge. Unauthorized departure or aimless wandering about the buildings of the Parts Plant will be cause for immediate dismissal.

G. J. NEWMAN (signed)
G. J. NEWMAN
Parts Plant Factory Manager."

[Respondent's Ex. 2, 363.]

On August 26, 1941, a further bulletin was published by Mr. Newman, which provided specifically:

"A great number of men are roving the shop during working hours. Some have legitimate reasons for doing so, while others are merely sight seeing. Bright red buttons are being issued to the foremen, who will see that each man leaving the department is supplied with one, and will return same when mission is completed. With the exception of the below named departments any man found out of his department without one of the 'roving' buttons will be sufficient cause for dismissal." [Respondent's Ex. 3, 369.]

Fisher was not an employee of any of the excepted departments. Fisher testified that he continued to follow the same procedure in the Parts Plant that he had at the Home Plant, regardless of the two notices above referred to, until he was notified personally to the contrary on December 13, 1942. He claimed that he had been informed by Powell, his foreman, and also by Newman, in substance, that these notices did not apply to him and he could continue as he had been doing in the Home Plant, to notify the foreman's clerk when he desired to leave on union business. There was no question but that it was necessary for Fisher to obtain a rover's button as a shop committeeman. He so admitted. The bulletin of August 26 with reference to the issuance of rovers' buttons applied to committeemen as well as to any one else who wanted to leave their department [Fisher, 406].

The requirement that permission to leave their department, and rovers' buttons, should be obtained for union shop committeemen as well as other employees was not an unreasonable requirement. The enormous Parts Plant, built at a cost of $22,000,000, had just been opened and was being occupied by many departments. It should be understood in considering the Fisher case that the Company is engaged entirely in war production; that the plant is surrounded by high wire fences, guarded by Army sentries; that all officials and employees must be American citizens; that all are fingerprinted and carry identification photographs; and that each department has its distinctive large colored button with the number of the department, which must be worn by the employee at all times in order to obtain access to the plant, to remain in the plant, and in order to leave. These disciplinary regulations are abso-

lutely necessary in order to keep employees within their departments, prevent possible sabotage and permit the Company's production to continue in an orderly manner.

The agreement with the Union provided that the regulations set forth in the Company's rule book (made a part of the agreement) were necessary for the efficient operation of the Company's plant and that infraction of any rule constitutes cause for discharge or disciplinary action [Board's Ex. 3, 154]. The rule book provided "No employee is permitted to leave his department during working hours without the authority of his foreman" [Respondent's Ex. 7, 942].

No where is there any complaint made that the requirement that a union committeeman must obtain permission and a rover's button in order to leave his department on union business hampered or restricted the Union in its relations with its members or the employees of the plant.

The Company charged that Fisher procured rovers' buttons without obtaining the permission of his foreman. He had been peremptorily told by his foreman Mineah, early in December, that he could not leave the department without the foreman's permission, and indeed Fisher made the alleged profane language of the foreman on that subject the matter of a grievance [Board's Ex. 16, 354], in which he stated that the foreman swore at him, told him that he would have to stay on the job, and threatened him with discharge. Fisher said that he had had permission from Kelly, the manager of Plant One, to do as he pleased. Mineah swore about it, said Kelly was not running the Parts Plant and threatened Fisher's discharge if he left his department again without his permission [Board's Ex. 16, 354]. The trial examiner's finding that Fisher was

left with the impression that Mineah was later told not to interfere with Fisher's legitimate activities as a union shop committeeman is contradicted by Fisher himself, who testified that it was only with reference to putting Mineah on the "right track" as to profane language that Mineah was spoken to:

> "Q. That Mr. Newman and Mr. Powell said that although Mr. Mineah told you you couldn't get out of your department without his consent, that they were going to tell him that you could go whenever you wanted to. Was that the idea of it? A. No, they were going to tell him in regards to the language he used and the way that he approached me and told it to me" [Fisher, 405].

In spite of this warning in early December, on December 13 Fisher made the occasion of the circulation of the petition with reference to working on Sunday, December 14, already discussed, the reason for visits to several departments in different buildings. He admitted that on this occasion he had no rover's button and had not obtained permission from his foreman. He claimed that as he went up the stairs in one department the quitting whistle had blown so that therefore he was on his own time [380].

It had been reported to Newman by foreman Stark of the wood-mill at 3:00 p.m. prior to quitting time, that Fisher was out of his department. Newman phoned Mineah, Fisher's foreman, asking if Fisher had his permission to leave, and when Mineah said he had not given permission, sent for Fisher to come to his office. Fisher admitted he did not have Mineah's permission to leave or a rover's button [838]. The Board has found on conflicting evidence that Newman called Fisher a "Jap lover,

a Hitlerite and a God damned communist." Both agreed that Newman told Fisher he was on thin ice. Newman denied calling him names but told him that there was a war on and that he ought not to interfere with a patriotic petition to work on that Sunday [838]. The blackout on December 10, the petition of the employees themselves to be permitted to work to make up the lost hours and to paint the plant, the signatures of thousands of employees, signifying their desire to work on Sunday at time and one-half, the attitude of the Union with reference to possible picketing of the plant, all undoubtedly contributed to a justified irritation on the part of Mr. Newman to Fisher's activities and disobedience.

On January 1, 1942, in spite of all previous warnings about obtaining permission from his foreman, Fisher obtained a rover's button from his foreman's clerk, a young boy who left the employ of the Company a few weeks thereafter. He told this clerk that Gahlbeck, his supervisor, had given him permission to leave, which was denied by Gahlbeck [681]. Fisher was in the middle of the adjoining building, allegedly investigating a complaint by the janitors, out of his department, when he met Newman and his two assistants, as Newman claimed, by accident. Fisher claimed that Newman pulled his rover's button off his shirt, which was denied by Newman and his two assistants, and the trial examiner found by weight of testimony that Newman did not do so. Newman then asked Fisher if he had his foreman's permission to leave and Fisher admitted that he had not.

Fisher admitted:

> "Q. And at that time he (Newman) asked you whether you had had the permission of the foreman to leave your department and you said no? A. That is right. That was the only question he asked me. Nothing else" [390].

Newman then confirmed with Mineah, the foreman, and Gahlbeck, the supervisor, that Fisher was absent without permission of the foreman and thereupon ordered his discharge. There is nothing to indicate either Newman or Mineah had any animosity toward Fisher because of his union activities but only because of his repeated violation of rules. Indeed Mineah marked his record as available for rehire, but Newman refused to reinstate him. There is testimony of every foreman and leadman under whom Fisher worked that they believed he had made his Union activities a pretext for leaving his department. The testimony of Fisher shows he believed he could disregard all rules because of his position as chairman of the union shop committeemen, and that the explanation given by the Company showed that his discharge was justified.

Where the Board has found that both Williamson's and Fisher's discharges were not unfair labor practices, remarks at the time of their discharge or prior thereto cannot be made the basis of an unfair labor charge of interference.

POINT III.

The Company By the Statements of Treasurer Shanahan to Shannon Did Not Interfere With, Restrain or Coerce its Employees, as the Circumstances Show That Such Statements Were Fully Justified in Criticism of the Attempt of the Union in the Wage Review Board to Coerce Non-Union Men into Joining the Union in Violation of the Contract Providing That it Would Not Discriminate Against Non-Union Men. The Remarks to Condon Were Isolated and Trivial.

At the hearing the counsel for the Board contended that Shanahan interfered with the union activities of Joseph J. Blake, chairman of the union committeemen in the Home Plant, during the last half of 1941 and of Edward Barnes, also a union committeeman, but the trial examiner found that the record did not support these contentions and the Board agreed [116]. These charges were introduced obviously to attempt to show an anti-union pattern of conversations by Shanahan with union shop committeemen. This leaves only the statements alleged to have been made by Shanahan to Condon and Shannon to be examined. We feel confident that the record will show that no coercion or interference was attempted in the case of Condon and that whatever Shanahan said to Shannon was provoked by and justified by the attempted discrimination against non-union men in the wage review by Shannon pursuant to the policy of the Union of discrimination against non-union men as set forth in its official paper.

Condon was an employee in the payroll division of the accounting department who served only four days in April, 1942, as temporary union committeeman to fill a vacancy.

He took up one grievance with Shanahan, the treasurer and head of the department on April 28, 1942, about Hardman, another employee, who had asked to be transferred from the payroll department and who wanted to have his wages reviewed by the six months wage review board and receive an increase before he was transferred out of the department [Condon, 163]. Shanahan told him he had spoken to Hardman about it, and so far as he was concerned, the matter was closed, and, in substance, that if any more was done about it he would have Hardman terminated, and that anyone who tried to do anything about the case was liable to get in trouble [164]. This was the only time he ever spoke to Shanahan [160]. No grievance was ever filed by the Union. Hardman did not testify, and there is no evidence that Hardman belonged to the Union. He is still in the employ of the Company at the same pay [167].

Shanahan testified that Hardman was, by his own admission, an unsatisfactory timekeeper and was told that he must either seek a transfer or be terminated [730]; that if he wanted a transfer to another department, it was necessary to find a foreman who would accept the transfer; that a man who has been transferred is brought up before the wage review in the department in which he is acting at the time of the wage review [731]; that Hardman wanted his case considered as a special case, but that no exception could be made [731]; that Hardman's claim for special wage review prior to his transfer from the department, and prior to the scheduled time for his review as not within his power to grant [732] and that he so told Condon [732]; that if Hardman was granted a wage review before his transfer, the foreman would

undoubtedly refuse to accept it and they would be compelled, therefore, to terminate Hardman.

None of this explanation was contradicted. No more trivial complaint with reference to anti-union discrimination could be presented to set in motion the vast and expensive machinery of the National Labor Relations Board. This case was not even made the subject of a grievance by either Condon or Hardman or the Union.

How the suggestion that anyone who tried to do anymore about the Hardman transfer would "get into trouble" could be carried out is not in the record. Certainly such a remark to a temporary committeeman who obviously didn't know the Company rules as to wage review on transfers could not be considered clothed with the dignity of an interference with the Union.

Shannon, the shop committeeman for Department No. 52 which comprised the timekeeping, accounting, and tabulating sections located at the company's Plant No. 2 in San Diego, testified on direct examination that he had several conversations with Shanahan concerning the Union, including one in April, 1942, in which Shanahan told him that he was sacrificing his chances for advancement [467]; that in May Shanahan brought out his list of men who were up for wage review and asked Shannon to sign the raises to save bickering and arguing in the wage review [467]; that Shanahan told him he had been accused of Union intimidation in cases of Barnes, Blake and one other, and asked Shannon if he had been intimidated, to which Shannon said "No" [467]; that in June Shanahan told him to keep out of the tabulating department, that he, Shanahan, could make trouble for him, and probably get him removed as committeeman [470]; that

Shanahan tried to get him to sign raises for two men, Mason and Kreutschamp [365, 366]; that Shanahan ordered him to sign the raises, told him he was the only committeeman who took these cases to the master board, and that he couldn't deal with Shannon and that Shannon's conscience ought to bother him [475].

The cross-examination of Shannon revealed clearly that Shannon was not only using his position to solicit men to join the Union on company time, but was using his position at the wage review board to discriminate against the non-union men whose names were presented by their foremen for advancement. He admitted that when he was furnished with a list of men by the Union several days before the wage review board [479] he went into the tabulating department to find out which were Union and which were non-union men and talked with them about their qualifications. When the foreman offered an increase for a non-union man Shannon agreed instantly [480].

Shannon testified:

> "Q. You listen to me. I am asking you if in every instance where a non-union man was recommended for an interim wage increase by his foreman, that the union didn't accept it instantly? A. I did [480].
>
> Q. And in the cases of union men who were recommended for a raise, say of 7¢, wasn't it your invariable custom to demand that they get a larger amount? A. I generally did try that, sure [480].
>
> Q. When you contacted the non-union men in the department to see whether the work they were doing would justify a raise, did you suggest to them

that they might join the union? A. Yes, sir; I did [482].

Q. Can you state that there was no occasion when you contacted a non-union man in your department about an interim raise that you didn't tell him if he joined the union you would see that he got a bigger raise than that recommended? A. I always told them I would try.

Q. You always told them that you would try to get them a bigger raise than that recommended if they would join the union? A. I told them I would try to do the best I could do for them" [482].

Shannon admitted that Shanahan told him he had no business to contact these men to try to get them to join the Union [472].

"Q. Well, had you done so? A. All I did—all I did was I went in to find out which were union members and which were not and at the time I asked them if they cared to be a union member and have me represent them as a union member.

Q. And for what purpose did you ask them that? A. So I could represent them better" [472].

The fact that the witness immediately agreed to the suggested raise for non-union men and asked more for Union men than the raises recommended by the foreman usually resulted in a compromise at the wage review board so that union men got more in some instances for the same kind of work than the non-union men [485].

Shanahan testified that he had no such conversations with Shannon except the one about Kreutschamp. Shannon knew that rate change slips had to be signed by the permanent members of the wage review board in the

wage review room before such changes would be effective [469]. Therefore, any proposal on the part of Shanahan to hold a session of the board as inferred by Shannon [469] would certainly have been fruitless and no doubt would have resulted in a grievance being filed by the union members on the wage review board. No such grievance was ever filed.

Shanahan said that Shannon almost invariably did not agree to the raises suggested by him and demanded many cents an hour more than the amounts proposed. Kreutschamp and Mason were non-union men who had received an increase of only 7¢ an hour [719], as recommended by their foreman. The Union demanded that union men on the same list should receive increases of from 20¢ to 40¢ an hour. Union men performing the same duties, with the same experience, and the same ability were given from 7¢ to 11¢ an hour increase [719]. Shanahan asked Shannon to agree to an increase for Kreutschamp of 4¢ an hour in order to make Kreutschamp's increase comparable with the increases granted to union men. Shannon would not approve this increase until such time as similar increases were given to union men [720]. This, of course, would have resulted in preserving the inequality which Shanahan was trying to correct [720]. Shanahan told him that he could either approve the increase or he would send it to arbitration, and that his conduct in not approving an increase for a non-union man was contrary to the spirit of the agreement and the entire Act [721]. Shanahan testified that he never had any difficulties with the other five committeemen in his department and had only 10 cases out of 125 sent to the master wage board for settlement by other committee-

men [721]; that Shannon never made an honest attempt to suggest reasonable rates [722]. Shannon's reply was that he was instructed by the Union to ask for those wage increases [723].

Shannon's conduct would have justified his discharge for coercing and discriminating against non-union men and soliciting them to join the Union on company time in violation of the agreement.

That Shannon's instructions came from the Union, was undoubtedly true, as is proven by the extracts from the union paper in a column written by Perry, business agent, in the issue of March 27, 1942, when he wrote:

> "This coming Wage Review will do such to equalize wage discrepancies if it is supported by a large, militant membership. Of course, the non-member doesn't expect much out of his Review, at least, it is my opinion that he had better not, so his disappointment will be less keen, for whether you know it or not, this is one time when the Company can't put anything over without the Union agreeing to it, and we'll see that we don't get pushed around too much!" [Resp. Ex. 8, 699.]

Again, in the issue of May 29, 1942, the business agent's report to the Union with reference to the operation of the wage review, stated:

> "All of the foregoing are Union-Company proceedings so what happens to the non-union man's case as it goes through the hurdles? You said it! It takes a helluva beating, as well it should, and gets dunked every time we get a poke at it, before running it out on the scrap pile" [Resp. Ex. 9, 709].

In the very recent case of *Christoffel v. Wisconsin Employment Relations Board,* 10 N. W. (2d) 197, the Supreme Court of Wisconsin, in a proceeding under the Wisconsin Employment Peace Act, which guarantees employees the right to refrain from joining and assisting labor organizations, and in which the court upheld an order of the Wisconsin Board that the union cease and desist from continuously soliciting employees to join the union or to coerce and intimidate them to join the union, the court referred to the National Labor Relations Act and said:

> "There is no such thing under the National Act as unfair labor practice by employees or any provision for investigation or determination of controversies between employees."

The criticism by Shanahan of Shannon's activities because of his attempted discrimination toward non-union men was well within the right of free speech. (*National Labor Relations Board v. Citizen-News Co.,* 134 F. (2d) 962 (C. C. A. 9.)

The non-union employees were just as much entitled to be protected in all of their rights as were the union employees. (*National Labor Relations Board v. Sterling Electric Motors,* 109 F. (2d) 194 (C. C. A. 9); *National Labor Relations Board v. Sterling Electric Motors,* 112 F. (2d) 63 (C. C. A. 9).)

That this discrimination against non-union was the settled policy of the Union is shown by the recent decision

of Mr. Robert Littler as an arbitrator between the Company and the Union in a recent arbitration under the contract. Mr. Littler, of the United States Conciliation Service, had been appointed by the War Labor Board in March, 1943 to sit as chairman of an arbitration board to hear 142 cases arising from the joint wage review boards. In his opinion handed down on these cases, he said:

> "The 'uncooperative' cases. Numerically these are considerable; But they all involve a single and narrow issue. The company takes the position that these workers are entitled to merit increases of varying amounts. As to all of them the Union either requests that there be no increase or that the increase be somewhat less than that proposed by the Company. As to practically all the cases, the sole reason advanced by the Union in the preliminary proceedings and one of the principal reasons advanced in these proceedings, was stated in almost identical language: 'We feel that this employee is uncooperative and does not help to increase production, which we are vitally interested in at the present time.'
>
> "Although the Union does not avow it, the conclusion is inescapable that the true reason is that the employee has refused to join the Union, and therefore, the Union resists the increase. I appreciate the motive behind this stand; but I must deprecate the means adopted."

POINT IV.

The Company by the Bulletin of Vice President Perelle Requiring Employees to Give Up Their Membership When They Were Promoted From Hourly Wage to Salary Did Not Interfere With, Restrain or Coerce Its Employees. The Letter of Wiseman to the Union With Reference to Pryor Proved Nothing.

In May, 1942, Vice President Perelle in charge of production, sent a memorandum to Renison, a supervisor, attaching a list of salaried employees who were part of supervision and paying dues to the Union, stating that this was contrary to Company policy and stating that if the employee did not desire to discontinue his affiliation with the Union he certainly should not be permitted to retain his present position but should be transferred back to a job commensurate with his ability and attitude concerning membership in the Union [Board's Ex. 10, 248]. The unit represented by the Union consisted only of hourly paid employees and excluded those on salary. In June, 1942, the Union filed a grievance protesting taking hourly paid employees within the jurisdiction of the Union and placing them on the administrative payroll at a salaried rate of pay, and particularly the action of foreman Stuart in the purchasing department in requesting such employees to write letters to the Union asking that they be removed from its rolls. The grievance requested the return of such employees to hourly rates [Board's Ex. 9, 243]. The Union was told that the action of Stuart had been taken pursuant to Perelle's memorandum. The record is silent as to whether and how the grievance was settled.

It was clearly Perelle's belief that supervisory employees upon salary were not included within the bargaining unit represented by the Union, and that it was inappropriate for foremen, assistant foremen and supervisors on salaries, who were considered to be a part of management, to belong to the Union, and that Union members who were promoted to such positions should not retain both their positions and Union membership. Whether or not Mr. Perelle's belief was correct in his interpretation of the agreement could only be determined by the filing of a grievance and settlement of the matter in arbitration.

Both the trial examiner and the Board found that the transfers were made from hourly paid rates to salaries without change in the job status of those involved, upon the testimony of Phillips [69, 115]. Any event such testimony of Phillips must necessarily have been only based on hearsay as he was not an employee of the Company and therefore not in a position to know the facts [see 242]. None of the employees mentioned in Mr. Perelle's memorandum were called as witnesses by the Union.

The evidence shows that an employee, Pryor, wrote to the Union that he had been promoted to assistant foreman and requested a withdrawal card. The union's representative told Pryor that he could drop his membership if he desired but that a withdrawal card could be issued only upon his becoming a general foreman. Wiseman, then Labor Relations Director, wrote the Union that he

knew of Pryor's letter and since Pryor was not within the classification covered by the contract, which covered only hourly paid employees, it would be appreciated if it was acted upon. There was no evidence whatsoever that the action of Pryor was instigated by the Company or that it was based upon anything except his own individual wish. It will be recalled that the agreement provided that the Company would recommend to employees that they join the Union and that the agreement provided for the check-off of dues. The trial examiner found that the Union took no action on this request of Pryor, who permitted his dues to become delinquent and was automatically dropped [69]. The action of Wiseman in writing to the Union in behalf of Pryon constituted no interference with the Union. Promotion to assistant foreman certainly placed the incumbent in a managerial position. The unit included only hourly paid employees and did not include foremen and assistant foremen on salaries.

The bulletin of Mr. Perelle, if it had been issued as to employees whose job status had not been changed and who had been transferred from an hourly to a salaried basis, could have been the subject of arbitration and the matter could have been determined whether his interpretation was correct.

POINT V.

In Order to Justify the Present Entry of an Order Directing the Company to Cease and Desist From Unfair Labor Practices There Must be Substantial Evidence as to a Course of Conduct and Pattern of Unfair Labor Practices in the Past From Which Reasonable Inferences Can be Drawn That Such Practices Are Likely to Continue in the Future.

Section 10(b) of the Act provides that whenever it is charged that any person has engaged in or is engaging in any such unfair labor practices the Board shall have power to issue and serve a complaint. Subdivision (c) provides that if upon all the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board may issue a cease and desist order. Under this provision of the Act there have been some decisions to the effect that the Board is empowered therefore to issue such an order in a case in which a person has engaged in and voluntarily ceased unfair practices. (*National Labor Relations Board v. Link-Belt Co.,* 311 U. S. 584, 600, 61 S. Ct. 358, 85 L. ed. 368; *National Labor Relations Board v. Burke Machine Tool Co.,* 133 F. (2d) 618 (C. C. A. 6); *Cleveland Cliffs Iron Co. v. National Labor Relations Board,* 133 F. (2d) 295.

In *Burke* case the court overruled the company's argument that the court should be governed by the usual rules of equitable injunction, and held in substance that the provisions of the Act above quoted broadened the rule with reference to equitable injunctions as to the absence of threatened or intended repetition of the acts complained

of. In *Cleveland Cliffs Iron* case it should be pointed out that the order was appropriate because although the company had ceased to operate the lumber camps at which unfair labor practices occurred, the order called for the reinstatement of employees to those camps in case operations should be renewed.

The alleged unilateral acts of the Company in this case, which were found by the Board to have constituted interference with the rights of the employees, were all voluntarily settled by agreement with the Union, except two, *viz.*, the third shift and the question of job classifications and wages pertinent thereto. The issue as to the third shift could have been taken to arbitration. The issue as to job classifications is not open to collective bargaining under the jurisdiction of the National Labor Relations Board because it has been transferred to and acted upon by the National War Labor Board. That matter has become academic.

The Board's decision in this case states:

> "We are not, however, convinced that this series of unilateral decisions by the respondent was a part of a conscious campaign on its part to undermine the authority and prestige of the Union as the collective bargaining representative of the respondent's employees or to evade the respondent's obligation to recognize and deal with the Union as such representative. This, we think, is demonstrated by the respondent's willingness to bargain with the Union as to these matters after the Union had objected to the action taken by the respondent and also by the fact that all but two of the issues thus raised were in fact amicably settled as a result of this collective bargaining between the parties after the event" [109].

The decision clearly recognizes the willingness of the Company to negotiate with the Union and that any matters in dispute could have been and can be in the future settled by arbitration.

The discharge of Williamson was amicably settled by his reinstatement, which should be sufficient to take from the record any statements made to Williamson at the time of his discharge or to justify an inference that such an occasion is likely to be repeated. The rest of the statement relied upon as interference with the rights of the employees do not show any pattern of hostility to the Union. In a period lasting several years in its relations with its many, many thousands of employees only these few trivial isolated instances, disputed by the Company, have been found by the Board to have constituted interference or coercion of its employees. Any order issued by the Board speaks as of the present and will operate in the future with reference to the future and should not involve the Company in contempt proceedings because of possible casual statements by foremen or supervisory personnel.

In *National Labor Relations Board v. Express Publishing Co.,* 312 U. S. 426, 85 L. ed. 930, 61 S. Ct. 693 (1941), no agreement between the employer and employees had been reached and the employer had refused to enter into an agreement. The court found that the employer has failed in only one respect to comply with the Act, *viz.,* failure to bargain with the Union in order to arrive at an agreement.

Nevertheless, the Board had issued a sweeping cease and desist order as to all violations of the Act in the

future by the company. This order had been modified by the court below. The Supreme Court confirmed the order of the court below and confined the cease and desist order to the only one subject before the Board, and said (312 U. S. 436):

> "It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. But we think that, without sacrifice of that principle, the National Labor Relations Act does not contemplate that an employer who has unlawfully refused to bargain with his employees shall for the indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation, for example, that he has discriminated against a labor union in the discharge of an employee, or because his supervisory employees have advised other employees not to join a union. See e. g. *H. J. Heinz Co. v. National Labor Relations Board,* 311 U. S. 514."

* * * * * * * *

> "We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here. To require it is no more onerous or embarrassing to the Board than to a court."

This rule was followed recently in *National Labor Relations Board v. Newark Morning Ledger* (C. C. A. 3, 1941), 120 F. (2d) 262, 269, where the court confined the Board's order, which had been sweeping in its terms, to the reinstatement of one employee, and said:

> "* * * It is, however, now settled in that in absence of a finding that the unfair labor practices actually engaged in by an employer have been so persistent and varied as to justify the apprehension of continued similar and varied efforts in the future to interfere with the employees' right of self-organization and collective bargaining, the entry of a blanket order to cease and desist from all violations of the Act is not justified * * *."

Both of those cases apply to one specific violation of the Act. The principle is equally applicable where the evidence shows that issues in dispute in the past have been settled. In this case there is no evidence whatsoever which would justify the Board in finding that unfair labor practices have been so persistent and varied as to justify the apprehension of continued similar and varied efforts in the future.

POINT VI.

A Cease and Desist Order Is Unjustified Upon the Record.

Section 7 of the Act gives the employees the right of self-organization, to join or assist labor organizations, to bargain collectively and to engage in concerted activities for the purpose of collective bargaining, or other mutual aid or protection.

The Board finds as a fact that

> "the respondent has not engaged in unfair labor practices within the meaning of 8(3) of the Act as alleged in the complaint [118]. Section 8(3) of the Act prohibits discrimination in regard to hire or tenure of employment on any term or condition of employment, to encourage or discourage membership in any labor organization. The Board has also found that the respondent 'has not engaged in unfair labor practices within the meaning of Section 8(5) of the Act as alleged in the complaint herein'" [118].

Section 8(5) of the Act provides that it shall be unfair labor practice

> "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(2)."

In view of the foregoing findings, the finding that the Company has violated the provisions of Section 7 of the Act is untenable and inconsistent. A violation of Section 8(5) of the Act is also a violation of Section 8(1), which in terms incorporates by reference all of the rights enumerated in Section 7, but the entire purpose of Section 7 is to permit the right of self-organization, to join

labor organizations and to engage in concerted activities for the purposes of collective bargaining.

In this whole record there can be found none of the usual acts indicating interference, restraint and coercion in violation of Section 8(1) of the Act, such as discharges of employees, threats of discharge, demotions or transfers, interference with wages, decreases in wages, bribes or gratuities, threats of physical violence, advice not to form a union or join a union, advice not to enter into a collective bargaining agreement, solicitation for a company union, espionage and surveillance of employees or interference with elections.

Most of the cases involving hostile expressions before the Board referred to organizers of a union, while it was in the process of organization. In this case the agreement had been made in which the Company agreed to recommend to its employees that they join the Union.

The honest expression of opinion is not condemned by the Act, where these expressions do not interfere with employees rights. There is no evidence in this case that any of the acts or conversations interfered with any of the employees rights. In *National Labor Relations Board v. Union Pacific Stages,* 99 F. (2d) 153, 179 (C. C. A. 9th), this court held that the statement of the president that if he had a son he would advise him against belonging to the Union, stating upon cross-examination that he thought if a young man worked diligently, conducted himself properly and tried to advance the interests of his employer he would fare better and get further than if he depended upon the Union for assistance, was not violative of the Act, and that the right of workers to organize was not destroyed by expressions of opinion by the em-

ployer or employee, such as referred to above; that the case was different where the employer made use of threats to prevent organization, circumstances entirely absent in the case at bar.

The isolated expressions, justified in the case of Liegal's calling Williamson an agitator, and Newman's statements to Fisher, and Shanahan's to Condon and Shannan, leave as acts of interference only the Pryor case, which amounted to nothing, and the Perelle memorandum, which, whether right or wrong in its interpretation of the agreement, as an isolated act does not justify the issuance of a broad cease and desist order.

POINT VII.

The Order of the Board Shall be Vacated and Set Aside and its Enforcement Denied.

It was conceded by counsel for the Union in the argument before the Board that this was an unusual case and that he was not familiar with another case with exactly the same points involved.

The record shows an earnest desire on the part of the Company to abide by the National Labor Relations Act and to negotiate with the Union with reference to any grievances that are presented. It has, however, maintained its own position with reference to certain phases of the union agreement which could have been taken to arbitration by the Union. Isolated remarks to its employees by various Company employees have not been shown to discourage the employees from collective bargaining for they have already done so and an agreement has been made in which the Union is recognized as the

representative of all employees and the Company has recommended in the agreement that employees join the Union, at the same time safe-guarding the rights of non-union employees by a provision that they will not be discriminated against by the Union. Under all of the circumstances in this case we are confident that Congress never intended that the acts and conversations shown in the record should be regarded as interference with, restraint or coercion of the Company's employees.

Respectfully submitted,

PRUITT, HALE & COURSEN,

By.....

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